No. 7756

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Mary Murray and Lena Murray, a Minor, by her Guardian ad litem, Mary Murray,

Plaintiffs in Error,

vs.

Southern Pacific Company, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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The statement of the plaintiffs in error of the testimony offered at the trial of the cause is practically correct, and almost complete. As stated by counsel for plaintiffs in error, there is but one real question to be determined; that is whether or not the actions of the deceased at the time immediately preceding the accident, were such as to constitute contributory negligence as matter of law. If so, then the action of the trial court in sustaining a motion for non-suit should be upheld, otherwise the case should be submitted to a jury.

An examination of the record will develop that there was but one witness present at the time the accident

occurred. He was in a position to see what transpired. He was the plaintiff's witness and his version of the affair is of necessity the appellants' version, and it was upon the circumstances as detailed by him that the learned trial judge based his action in sustaining the appellee's motion for a non-suit. We feel, therefore, that the circumstances of the unfortunate accident as detailed by this witness on cross-examination may be properly set out in full for the guidance of the court in the application of the authorities which are then to follow.

Bearing in mind the fact that this living witness was not in a position to see or understand the dangers that confronted one in attempting to alight, with the same vision of completeness as the deceased, we quote his testimony as follows:

"We left San Francisco at eight o'clock in the evening. The accident happened twenty minutes after eleven. About an hour before we reached Santa Margarita, I don't know whether Murray asked the brakeman or whether he volunteered the information in regard to where the Hotel Santa Margarita was situated. The brakeman told Murray. He said it was on the opposite side of the track from the depot. He advised Mr. Murray at that time that the hotel was on the opposite side of the railroad from the station. Before we reached the station he pointed out the hotel on the opposite side of the station, saying, 'There is your hotel.' Then he turned and walked away after he opened the vestibule door. He didn't say anything about getting off, which side we should get off on, while we were on the platform. Just opened the door and walked away. Mr. Murray then descended the steps with his grip in his left hand. He had told of the

hand-hold with his right hand. He did not turn his back to the engine while he was on the car. When he went out hanging onto this thing it swung with him with his back to the engine. The train was going perhaps twelve miles an hour, perhaps more; I could not tell. I happened to look out. I was standing back from the steps and I had to glance up that way to where the light was cast out of the car window, and there I saw the ground. I saw Mr. Murray step off; he stepped like he thought there was another step to the ground. I think the train was going 12 miles an hour, fully that. He heard my warning and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight and I called to him. He tried his best to recover himself, but he could not get back. The train ran about seven coaches from where he got off. I do not know anything when they opened that vestibule door; the one on the station side. It was not open when I was talking with Murray at the top of the stairs. We had not then reached the station yet. I do not know whether it was open when we reached the station. I have not been to Santa Margarita since the date of the accident. The Santa Margarita Hotel is, I should judge, about between 300 and 350 feet—or perhaps 400 feet north, then west—from the line directly north—about 150 or 200 feet. The train traveled about 350 to 400 feet after Murray stepped off. He could see out, if he wasn't trying to see where he was stepping. I don't know how that looked to him from that position; I could not say down here." [Tr. of record, pp. 75-76.]

Thus it will be seen that the "invitation" discussed by counsel for plaintiffs in error consisted merely in a piece of friendly information given to the deceased as

to the location of his hotel, and that at the time the deceased attempted to alight, as shown by the record, it was with a realization that he was assuming a dangerous position in alighting at a point other than that designated by the defendant company in the erection of its station-house.

As was said by the Supreme Court in the case of Craven v. Central Pacific Ry. Co., 77 Cal. 347:

> "*Did the plaintiff at the very time of the accident* negligently jump off the train while it was moving? If she did not, the verdict must be for the plaintiff. If she did, then there can be no doubt that her negligence contributed *proximately* to the injury. It was the very thing then and there directly causing it."

In Schouler on Bailments and Carriers (3rd Ed., Sec. 662), it is said:

> "Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station, or in starting before he had due opportunity to land."

In Holyman v. Kanawha & Michigan R. R. Co., reported in Vol. 17 American & English Annotated Cases, it is said:

> "The general rule is that passengers getting off moving trains are chargeable with contributory negligence and cannot recover for injuries received therefrom.
>
> "The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of

proving that the peculiar circumstances of the case justified him in such course."

Also in 1 Ann. Cas. 779, the court said:

"Even where the train is moving slowly, the act of alighting therefrom may constitute contributory negligence as a matter of law if the person so alighting is in a weak physical condition or of advanced age."

In the case of East Tennessee etc. Ry. Co. v. Massengill, 15 Lea. (Tenn.) 328, it is said:

"The general rule is that passengers injured while getting on or off moving trains cannot recover for injuries. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course."

In the case of Illinois Central Ry. Co. v. Davidson, 64 Fed. 301, 24 U. S. App. 354 and 12 C. C. A. 18, it is said:

"A passenger who unnecessarily and negligently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the danger to which he is exposed."

In the case of Raben v. Cen. Iowa R. Co., 73 Ia. 581, the court said:

"This instruction was erroneous in the particular that it asserts that 'such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them

down safely thereat.' This in its latter portion states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligations of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done, the duty of the conductor ceases. Sevier v. Vicksburg etc. R. Co., 61 Miss. 8, Am. & Eng. R. Cas. 245; Straus v. Kansas City etc. R. Co., 75 Mo. 185."

In Vol. 17, American & English Ann. Cas. (in discussing the case of Holyman v. Kanawha & Mich. Ry. Co., *supra*), on page 1154 the author uses this language:

"Question of Law."

"In some jurisdictions it has been held that it is negligence *per se* to alight from a moving train, and that such negligence bars a recovery for the injuries received thereby, although the carrier was negligent in the first place. Joyce v. Los Angeles R. Co., 147 Cal. 274, 82 Pac. 204; Newlin v. Iowa Cent. R. Co., 127 Ia. 654, 103 N. W. 999; Owens v. Atlantic Coast Line R. Co., 147 N. C. 357, 61 S. E. 198, approving Morrow v. Atlanta etc. Air Line R. Co., 134 N. C. 92, 46 S. E. 12. See also Mearns v. Central R. Co., 139 Fed. 543, 71 C. C. A. 331; Whitfield v. Atlantic Coast Line R. Co., 147 N. C. 236, 60 S. E. 1126; Boulfrois v. United Traction Co., 210 Pa. St. 263, 2 Ann. Cas. 938, 59 Atl. 1007, 105 Am. St. Rep. 809."

Thus it has been held that a person who is injured in leaping from a train moving at the rate of 14 or 15 miles an hour cannot recover for his injuries.

Woolry v. Louisville Ry. Co., 107 Ind. 381.

These are only a few general authorities in which the rule has been well expressed that an adult person, even though suggestions and advice have been given him by members of the train crew, in attempting to alight from a moving train, assumes the risk, by virtue of being compelled to exercise his own judgment as a free agent.

In *Whitlock v. Comer,* 57 Fed. 565, it is said in regard to passengers stepping off moving trains:

> "An adult male passenger, waiting for a railroad train to come to a full stop before attempting to alight, who, when directed and required by the conductor, jumps from the moving train, when it is obvious that he can not do so with safety, and thereby sustains injuries, can not recover damages for such injuries."

In *S. & N. A. R. Co.* v. *Schaufler,* 75 Ala. 136, the Supreme Court of that state says:

> "Where an adult passenger leaves a moving train under the advice or direction of the conductor, he can not recover for injuries received as a result where such advice or direction is so opposed to common prudence as to make it obvious act of recklessness or folly."

In *Saint Louis etc. Ry. Co.* v. *Rosenberry,* 45 Ark. 256, the Supreme Court of Arkansas says:

> "A passenger boarded a freight train to go to a station at which the train did not stop. The con-

ductor was angry and abusive and ordered the passenger to jump off when the train reached the station. He made no threats to put him off, however, and there was no reason to suppose that this would be done. The passenger jumped off while the train was going 10 or 12 miles an hour and sustained injuries. HELD, that his conduct precluded his recovering damages from the company."

To the same effect is the decision of the Supreme Court of Georgia, reported in 92 Ga. 388, 17 S. E. 949:

"In an action against a railroad company for injuries to plaintiff's daughter, 17 years of age, caused by jumping from a train while in motion, plaintiff alleged that she was ordered so to do by the conductor, who refused to stop the train at that point, for which she had bought a ticket. HELD, that there could be no recovery though the conductor did give such order if the danger of obeying was so manifest that a person of her age in the exercise of ordinary discretion would not have done so."

The rule in Indiana is to the same effect, as is shown by the case of Jeffersonville R. Co. v. Swift, 26 Ind. 459:

"Where a passenger voluntarily leaves a train of cars while in motion, it is insufficient to charge the company that the conductor advised him that he could safely jump from the train."

"A passenger who was asleep when his station was reached, being told by the conductor shortly after passing it that if he wanted to get off to get off quickly, took his stand on the steps ready to get off if the train stopped and while standing there was thrown off by a sudden jerk in taking up the

'slack.' HELD, that he was guilty of contributory negligence."

Lindsey v. Chicago etc. Ry. Company, 737.

"The act of a passenger in jumping from a train running 20 miles an hour is such a reckless act that it will prevent him from recovering of the carrier for the injuries sustained, though the conductor may have advised him to jump."

C. & O. Ry. Co. v. Gregson, 12 Ky. L. R. 604.

"The calling of a station and opening and fastening back of the car door by its brakeman was NOT an invitation to plaintiff, a passenger, to step off a moving train."

England v. B. & M. Ry. Co., 153 Mass. 490, 27 N. E. 1.

"A passenger injured by deliberately, and for his own convenience, jumping off a moving train, can not recover because the conductor told him when to jump and slackened the speed of the train a little, refusing to stop and not being obliged to stop."

Bardwell v. Mobile & Ohio Ry. Co., 63 Mill. 574, 56 A. R. 842.

Giving the theory of plaintiffs in error the benefit of every inference which might be drawn from the testimony, if they are to be bound by the law as laid down in the case of Bardwell v. Mobile and Ohio Ry. Co., last above quoted, certainly in view of their own testimony that the deceased was alighting on the opposite side from the station, inferentially for the reason that his hotel was located on that side, then the action of the court would be warranted by the authorities.

"A passenger INCUMBERED WITH HANDBAGGAGE, who alighted from a train moving SIX miles an hour on a dark night before it had reached the platform of the station where he was to get off and with which he was familiar and with no reason to believe the train would not stop, WAS NEGLIGENT."

S. & N. A. v. Schaufler, 75 Ala. 136.

"It is gross negligence in a passenger on a street railway to jump from a car when it is going at a speed of 20 miles an hour, whether he knows or does not know that the car is going so fast."

In connection with the question of speed, it will be remembered that in this case the appellants' testimony places the rate of speed at which the train was traveling at much less than the speed of the train in the case above quoted from.

Masterson v. Macon City R. Co., 88 Ga. 436, 14 S. E. 591.

"Where a passenger after the conductor called his station gets off the train several hundred yards before it reaches the depot and while running at a high rate of speed, he is guilty of such negligence as precludes a recovery for such injuries received."

L. & N. v. Depp, 33 S. W. (Ky.) 417.

"The belief that the train from which plaintiff stepped while in motion was standing still DOES NOT rebut the presumption of contributory negligence in the absence of evidence showing that such belief was unreasonable."

C. B. & Q. Ry. Co. v. Landauer, 39 Neb. 803, 58 Mo. 434.

"An adult who knowingly and unnecessarily steps from a moving train, is GUILTY OF CONTRIBUTORY NEGLIGENCE as a matter of LAW."

Olson v. Milwaukee & St. Paul Ry. Co., 102 N. W. (Minn.) 449;

Lynch v. Interurban St. Ry. Co., 88 N. Y. S. 935;

Walters v. Chicago & Northwestern Ry. Co., 89 N. W. (Wis.) 367.

"Where, after the porter had announced the last station and opened the vestibule door of the car, plaintiff erroneously supposing that the train had stopped, stepped out into the vestibule, passed down the steps and thence to the platform while the train was moving, was injured in so doing, he was guilty of contributory negligence, precluding recovery."

Mearns v. Central Ry. of New York, 139 Fed. 543, 71 C. C. A. 331.

"Leaving a moving train is *necessarily* contributory negligence on the part of a passenger."

E. & T. H. Ry. Co. v. Athon, 33 N. E. (Indiana) 469.

In Gress v. Missouri Pacific Ry. Co., 84 S. W. Rep. 122, it is said:

"A passenger is guilty of contributory negligence as a *matter of law* in attempting to leave a train moving at the rate of *five miles* an hour."

In Aguilo v. New York etc. Ry. Co., 43 Atl. 63, it is said:

"The fact that a carrier negligently leaves open a gate on the platform of its cars *does not make it*

liable for injury caused by one negligently attempting to alight from a moving train."

In Rosenthal v. Troy and N. E. Ry. Co., 147 N. Y. S. (1014) 725, it is said:

"A trolley passenger who may alight with safety on the station side, but who alights on the opposite side where there is a drop from the car step to the ground of about 30 inches, is *as matter of law* guilty of contributory negligence."

"A person alighting from a train running from 10 to 15 miles an hour and increasing its speed as it is leaving a station, is GUILTY OF CONTRIBUTORY NEGLIGENCE."

Carter v. Seaboard Airline Railway Co., 81 S. E. (N. C. 1914) 321.

"Railroad passengers must exercise ordinary care to leave the train upon its arrival, as well as to ascertain the means of exit from the coach."

Fort Worth etc. Ry. Co. v. Taylor, 162 S. W. (Texas 1914) 967.

"A passenger can not recover for injuries in alighting from a train when his own conduct was wanting in ordinary care for his own safety."

Saint Louis etc. Ry. Co. v. Platt, 157 S. W. (Ark. 1914) 385.

"A passenger on a regular passenger train is not justified in relying on the promise of the engineer to slow down the train to permit him to alight on the assumption that he has authority to slow down trains for that purpose and the promise of

the engineer so to do is not a promise of the carrier."

Clark v. Santa Fe Railway Company, 128 Pac. 1032, 164 Cal. 363.

"The calling of a station by the brakeman and the opening of the door of the car is an invitation to the passenger desiring to alight at the station TO GET READY TO DO SO, but is an invitation to alight only AFTER THE TRAIN HAS STOPPED."

Illinois Central Railway Co. v. Dallas, 157 S. W. (Ky. 1914) 536

"It is negligence for a passenger to attempt to alight from a train when in motion."

Dallas v. Illinois Central Ry. Co., 139 S. W. (Ky. 1912) 958.

"Where plaintiff, a railroad passenger, on paying his fare was informed that the train did not stop at the station to which he desired to go, but on approaching the station heard two blasts of the whistle, which he supposed was a stop signal and told the brakeman that he desired to alight if the train stopped and the brakeman simply said, 'All right,' and opened the vestibule, and when plaintiff attempted to alight the train suddenly increased its speed and he was thrown and injured, he was guilty of contributory negligence, precluding recovery."

Chicago, Rock Island etc. Ry. Co. v. Clounts, 138 S. W. 332.

"A passenger is bound to use reasonable diligence and care in getting off a train."

40 Pa. Sup. Ct. 252.

"Ordinarily a passenger is not justified in alighting from a train in motion except at his own risk."

Chicago etc. Railway Co. v. Lampman, 104 Pac. (Wyo.) 533.

"A passenger is guilty of contributory negligence as a MATTER OF LAW in attempting to leave a train moving at the rate of FIVE MILES an hour."

Gress v. Missouri Pacific Ry. Co., 84 S. W. (Missouri) 122.

"The fact that a carrier negligently leaves open a gate on the platform of its cars DOES NOT MAKE IT LIABLE for injury caused by one negligently attempting to alight from a moving train."

Agulino v. New York etc. Ry. Co., 43 Atl. (R. I.) 63.

"A trolley passenger who may alight with safety on the station side, but who alights on the opposite side where there is a drop from the car step to the ground of about 30 inches, is AS A MATTER OF LAW guilty of contributory negligence."

Rosenthal v. Troy & N. E. Ry. Co., 147 N. Y. S. (1914) 725.

"A person who is carried beyond his station may not alight from a moving train, though invited to do so by an employee of the carrier, where the danger of alighting is apparent."

Carter v. Seaboard Airline Ry. Co., 81 S. E. (N. C. 1914) 321.

Perhaps no better statement of the law governing this case could be found than that of the Honorable Trial Judge in the instant case, granting a non-suit

herein, reported in 225 Fed. Rep. 297, which reads as follows:

> "It is probably true, as contended by plaintiff, that it is not negligence *per se* for a passenger to alight from a train while the train is moving. The presence or absence of negligence in such a case would depend upon the concomitant circumstances. The Supreme Court of California in Carr v. Eel River Railway Company, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, approved of an instruction to the effect that:
>
> " 'Ordinarily a passenger would be held not to be justified in getting off the train while it is in motion, except at his own risk. Unless the train is moving very slowly, and the circumstances are specially favorable, it would be deemed *prima facie* negligence.' "

Construing this instruction further the court said:

> "A passenger's act in jumping from a moving train may be grossly negligent, and thereby release the carrier from all liability, notwithstanding it was done at the suggestion or upon the assurance of safety by the employe. The employe's advice at the moment is in no sense conclusive upon the passenger as to his negligence or non-negligence in jumping from the train. Like every other circumstance surrounding the transaction, it casts some light upon the scene, and thereby aids the court according to the power and brilliancy of its light in each particular case, to determine what a careful, prudent man would have done, placed in the position of the unfortunate passenger. * * * The earlier cases in many instances recognized the principle of negligence *per se* in alighting from a moving train, but mod-

ern authority to a great extent has supplanted that doctrine with broader views upon the question.

"Surely in the case at bar there were no circumstances 'specially favorable,' as referred to by the California Supreme Court, which would tend to remove the *prima facie* impression of negligence, caused by one who assumes the risk of attempting to alight from a moving train. On the contrary, the circumstances herein were to my mind more than ordinarily unfavorable. The night was dark, the train was moving at a considerable rate of speed, and the deceased was entirely unfamiliar with the condition of the ground upon which he was to alight. In addition he was incumbered with a grip or valise in one hand.

"The danger of attempting to alight under such circumstances was obvious to his companion, who was behind him, and it must have been obvious to him. To attempt to alight in the face of such danger, and in the face of such unpropitious circumstances, was substantially to take his life in his own hands.

"The suggestion is made by plaintiffs' counsel that he may not have noticed his position and danger or that he may have lost his hold upon the car and fallen off accidentally. There is no proof, however, to support the inference that he fell off accidentally. In any event, there was nothing in the conduct of the brakeman to justify him in placing himself in, or permitting himself to get into, a place of danger, which by the use of the most casual observation and prudence upon his part could have been plainly obvious to him. I can come to no other conclusion than that the death of plaintiffs' intestate was due to his want of care,

and that to permit the verdict of the jury to stand, and the defendant to be holden responsible therefor, would be to give countenance to a manifest and profound injustice."

Murray et al. v. *Southern Pacific Company*, 225 Fed. Rep. 297.

We trust that we may be pardoned for having presented the long list of authorities, but, feeling as we do that the conduct of the deceased was such as to *amount to contributory negligence as matter of law,* and that the action of the learned trial judge was entirely proper in so holding, we felt justified in citing the authorities at length, in order that this court might understand the conditions upon which his action was predicated.

Respectfully submitted,

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